IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION
FIRST APPEAL NO.888 OF 2004
WITH
CIVIL APPLICATION NO. 2802 OF 2004

Ramesh Bhimraj Ingale
Age-32 years, Occ: Service,
R/o. House No.4610, Hanumanwadi,
Panchavati, Nashik ...Appellant.
(Orig.Applicant)

V/s.

Chhaya Ramesh Ingale
Age-27 years, Occ: Household
R/o. C/o. Vasant Gopinath Korde,
Shivajinagar, Sahakar Colony,
Poona Road, Nashik. ...Respondent.
(Orig.Opponent)

Shri Harshad E. Palve, adv. for the Appellant.
Shri K.S.Patil with P.N.Joshi, advs. for the Respondent.

CORAM: Anoop V. Mohta, J.
DATE : 21st December, 2005.

P.C.:

1. Heard the learned counsel appearing for the Appellant. The father of the child named Pratik Ramesh Ingale now aged about 11 years, has challenged the common judgment and order dated 15/07/2004 passed by the V Additional District Judge, Nashik whereby, the basic question about the guardianship of the minor Pratik has been decided against him. The learned Judge after considering the material placed on the record concluded in the following terms:

ORDER

"1. Civil Misc. Appln. No.1/2000 is hereby allowed whereas Civil Misc. Appln. No.157/2000 and 235/2000 are hereby dismissed.

2. The petitioner in Civil Misc. Appln. no. 1/2000 Sau.Chhaya Ramesh Ingale is hereby appointed as guardian of the minor Pratik Ramesh Ingale, age 8 yrs. r/o. Nashik.

3. The respondent-husband Mr.Ramesh Bhimraj Ingale to hand over the custody of the minor son Pratik to the petitioner within a period of a month from the date of this order.

4. The custody of the minor daughters Naina and Yogeshri shall remain with their mother Sau. Chhaya Ramesh Ingale.

5. The father Mr. Ramesh Bhimraj Ingale will however be at liberty to visit the minors at the house of the mother Sau. Chhaya Ramesh Ingale as well as in the school at any time excluding night hours with a pre-intimation of such visit to the mother Sau. Chhaya

Ramesh Ingale. He shall however not make any effort to removing the minors from the custody of the mother.

6. No order as to costs."

2. A Welfare of a minor is a prime consideration while deciding the, custody of such minor.

3. In the present case, admittedly, the minor-Pratik, since 19th March, 1995, has been living with his father-the appellant, and a grandfather. An Application was filed by the mother/respondent when Pratik was of 8 years, for his custody. There was no earlier application on the record by the mother to take custody. The Court, therefore, considering the age of the minor and the mother’s desire, apart from her legal right to claim custody of minor, has passed the impugned order in her favour. By consent the minor Pratik with his parents was called in the chamber. The mother was absent but her advocate was present. In free atmosphere, individually and also with father and in presence of advocates, the minor Pratik was interviewed. He was aware of the reason of this meeting. His firm expressions and desire to stay with the father remained undisturbed. I am also convinced that he has a strong desire and wish to live with his father and grand father

with whom he is living since childhood. This aspect is very relevant, specially when we are considering the welfare of the child. An expressive and strong desire and happiness of the child is also important to consider such application for appointment of guardian.

4. Assuming for a moment that the Appellant may not be available for more than 11-12 hours and/or nobody is available in the father's house to look after minor except his grandfather, still, one aspect which cannot be overlooked at this stage is that admittedly, the minor-Pratik is a school going child, he would be attending classes. After classes, he would be busy in his studies and such other extra activities. The availability and the presence of the grandfather in his house can not be overlooked, specially when Pratik himself said that his father and the grandfather have been taking all due cares and giving him love, attending and affection. He is happy with them, I see there is no reason now at this stage to disturb Pratik's happiness and enjoyment which he is getting from his father and the grandfather. The minor Pratik has not expressed his any desire to live with his sisters also. There was no challenge made or any contention raised about the custody of the two minor daughters by the parties. We are concerned at this stage the minor-Pratik's welfare and

his happiness. In this background and as he has been living with father and grandfather since his childhood, this application as filed by his mother for his custody after such a long time, cannot be accepted.

5. There is nothing pointed out on the record to suggest that the father is unfit and incapable to take care of the minor-Pratik. After considering the material placed on the record, I am of the view that in the facts and circumstances of the case, the father-appellant needs to be appointed as a natural guardian of Pratik and not the mother-respondent.

6. Normally a presumption is, a mother is a better person to look after a minor than a father.

7. In **Kamalamma v. Laxminarayana Rao AIR 1971 MYSORE 211 (V 58 C 53)** a division Bench of Mysore High Court has considered and observed that mere saying that mother is a better person to look after the interests of the minor than the father itself is not sufficient. It needs to be proved. In the present facts and circumstances of the case, the above observed material is sufficient to reverse the order. In view of this impugned judgment and order is quashed and final order is as under:

ORDER

1. Civil Application No.1 of 2000 is dismissed whereas Civil Application No.157 of 2000 is allowed.

2. Petitioner/Applicant in Civil Application No.157 of 2000 is appointed as guardian of the minor Pratik Ramesh Ingale now aged 11 years.

3. The custody of the minor Pratik should remain with the Appellant-Ramesh Bhimraj Ingale and custody of the minor daughters, Naina and Yogeshri should remain with the mother- Chhaya Ramesh Ingale.

4. The respondent-mother will, however, be at liberty to visit minor-Pratik at the house of father Ramesh, as well as in the school, at any time with pre-intimation of such visit to the Appellant-Ramesh.

5. In view of this Appeal is allowed.

6. No order as to costs.

7. In view of this, Civil Application is also

disposed of.

(ANOOP.V.MOHTA)